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Supreme Court of the United States

OCTOBER TERM 1970

No. 1439

CENTRAL GULF STEAMSHIP CORPORATION,
Petitioner,

versus

GRACE LINE, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

No.

CENTRAL GULF STEAMSHIP CORPORATION,
Petitioner,

versus

GRACE LINE, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on September 19, 1969 and the denial by the said Court of petition for rehearing on January 20, 1970.

CITATION TO OPINIONS BELOW.

The Findings of Fact and Conclusions of Law and judgment of the United States District Court are reproduced in the Appendix. The opinions of the United States

Court of Appeals for the Fifth Circuit are reproduced in the Appendix and are reported in 416 F.2d 977.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 19, 1969. Rehearing was denied on January 20, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

1. May a time charterer extend by written agreement the one year limitation imposed by COGSA on the shipper while settlement limitations proceed?

2. Does an extension by the time charterer granted to the shipper later preclude an action for indemnity by the time charterer against the vessel?

STATUTES INVOLVED.

Carriage of Goods by Sea Act (COGSA) 46 U.S.C. 1303 (6).

STATEMENT OF CASE.

This application of Central Gulf Steamship Corporation for a Writ of Certiorari is to review a judgment of the United States Court of Appeals for the Fifth Circuit which reversed and remanded, insofar as it applies to Petitioner, the judgment of the United States District

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Court of the Eastern District of Louisiana which granted Petitioner, Central Gulf Steamship Corporation, Indemnity against respondent for damages adjudged against Petitioner.

Central Gulf time chartered the S/S *Santa Victoria* using the government form approved by the New York Produce Exchange as amended. Central Gulf then entered into an agreement with a shipper to transport cargo of yellow corn in bulk from the port of New Orleans to the port of Kandla, India.

Upon arrival in Kandla, India and on August 9, 1959, it was noted that a portion of the cargo had been damaged by water which apparently was the result of sweating by the vessel.

It was found by the court below and not controverted at this point that the sweat was caused by the manner of loading, which prevented proper operation of the ship's ventilation system.

The shipper's insurer, Royal Insurance Company, and Central Gulf commenced settlement negotiations. No settlement was reached upon the anniversary date and Central Gulf granted in writing an extension of the one-year limitation for bringing suit to May 9, 1961. This extension of time was given with the written consent of Grace Line, Inc. Subsequent to this Central Gulf gave an additional extension of time to August 9, 1961, but no written consent was obtained from Grace Line, Inc.

On August 9, 1961, suit was filed by Royal Insurance Company against Central Gulf and Grace Line, Inc. Answers were filed by both parties and a Petition of Impleader under the old Admiralty Fifty-sixth Rule was filed by Central Gulf against Grace Line seeking indemnity.

Grace Line moved for a summary judgment against both parties based on the one-year limitation period of COGSA and the fact that written extensions had not been given by Grace Line, Inc. up to the actual date of filing. Summary judgment was granted as to Royal Insurance Company but not as to Central Gulf.

After a trial on the merits, the District Court found for Royal Insurance Company against Central Gulf. However, it granted indemnity to Central Gulf against Grace Line, Inc.

The reasoning was that it found as a matter of fact that the vessel owner, Grace Line, Inc. breached its duties under the applicable time charter.

The United States Court of Appeals for the Fifth Circuit reversed the granting of indemnity by the District Court on the grounds that Central Gulf's claim for indemnity was barred by the one-year limitation period 46 U.S.C. 1303 (6).

REASONS FOR GRANTING THE WRIT.

When the Fifth Circuit held that the indemnity cause of action by Central Gulf against Grace Line, Inc. was barred by the statutes of limitation of COGSA it created a disparity between the law of that Circuit and the law of the Ninth Circuit, the Second Circuit, and the Third Circuit.

It is a fundamental concept of maritime law that a cause of action for indemnity does not accrue until the indemnitee has been cast in judgment. *States Steamship Company v. American Smelting and Refining Company*, 339 F.2d 66 (9th Circuit 1964).

The Second Circuit has held that when a time charterer filed suit against the vessel owner prior to its being sued then its cause of action was premature. *Greenwich Marine, Inc. v. S/S Alexandria*, 339 F.2d 901 (2nd Circuit 1965).

The Third Circuit has also held that on a maritime claim for indemnity the time does not begin to accrue until liability is fixed by judgment or upon payment by indemnitee. *United N.Y. Sandyhook Pilots Assn. v. Roderman Industries*, 394 F.2d 65 (3rd Circuit 1968).

The Fifth Circuit has in dicta recognized that the one-year limitation period of 46 U.S.C. 1303 (6) can be extended by agreement without a loss of the cause of action. *United Fruit Company v. J. A. Folger & Co.*, 270 F.2d 666 (5th Circuit 1959).

Central Gulf's case against Grace Line, Inc. was based upon the fact that Grace Line, Inc. breached the express obligations under the charter contract.

Both the Trial Court and the Court of Appeals agree that there was a breach of this contract.

It is an uncontroverted fact that Central Gulf was damaged by this breach. Central Gulf issued a clean bill of lading as the time charterer and at destination a portion of the cargo was rejected because of the sweat damage. In an effort to minimize litigation, settlement negotiations were conducted between Central Gulf and the shipper.

When a settlement agreement could not be reached prior to the one-year period, Central Gulf extended the time in order to avail both parties additional time in which to effect a settlement. Had not Central Gulf extended this time, suit would have been immediately filed.

The effect of the Fifth Circuit's holding in this matter is twofold. First, it holds that any extension by party possibly liable under COGSA actually extinguishes the cause of action. Second, it implies that suit for cargo damage indemnity on the time charter must be brought against shipowner within one year.

There is no jurisprudence to support the proposition that an extension of time agreed upon by the parties absolutely extinguishes the cause of action under COGSA. The Fifth Circuit's own *Folger* case, *supra*, actually supports the propriety of extensions by the parties.

The maritime jurisprudence of the other circuits is actually contrary to the holding that a cause of action on indemnity begins to accrue prior to payment by indemnitee or judgment against indemnitee.

To substantiate its holding the Fifth Circuit relies on two cases: *United Airlines v. Wiener*, 355 F.2d 379 (9th Cir. 1964) and *American Tobacco Co. v. Transport Corp.*, 277 F. Supp. 457 (E.D. Va. 1967). These two cases arise out of claims for indemnity based upon tort. Indemnity was denied on the basis that the indemnitee was not liable in the first place. Clearly they are not proper support for the far reaching decision of the Fifth Circuit on relations between maritime carriers, charterers, and shippers.

CONCLUSION.

Petitioner urges this Court to issue a Writ of Certiorari to the Fifth Circuit in order to clear up the disparity between Circuits and to clearly define the law of limitations under COGSA and standard form time charterers.

Respectfully submitted,

ROBERT B. ACOMB, JR.,
28th Floor,
Louisiana and Southern Life Building,
New Orleans, Louisiana,
Attorney for Petitioner,
Central Gulf Steamship Corporation.

CERTIFICATE.

I certify that a copy of the foregoing petition for certiorari and accompanying brief has been served on opposing counsel by depositing same in the U.S. Mail postage prepaid. .... day of April, 1970.

ROBERT B. ACOMB, JR.

DECREE.

(Number and Title Omitted.)

(Filed June 21, 1966.)

This cause came on for trial at a former day upon the pleadings and proofs adduced on behalf of the respective parties and, after hearing argument of proctors for the parties at interest, the Court having found that judgment herein should be entered in favor of libellant and against Central Gulf Steamship Corporation for the damages sustained by libellant, together with interest from November 8, 1965, and costs; and the Court having further found that judgment should be entered herein favor of Central Gulf Steamship Corporation and against Grace Lines, Inc., respondent-impleaded, for the damages sustained by Central Gulf Steamship Corporation, together with interest from November 8, 1965, and costs; accordingly.

IT IS ORDERED, ADJUDGED AND DECREED that judgment be, and is hereby, entered in favor of libellant, Royal Insurance Company, Ltd., and against Central Gulf Steamship Corporation for damages sustained by libellant, together with interest from November 8, 1965, and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be, and is hereby, entered in favor of Central Gulf Steamship Corporation and against Grace Lines, Inc., respondent-impleaded, for damages sus-

tained by Central Gulf Steamship Corporation together with interest from November 8, 1965, and costs.

IT IS FURTHER ORDERED BY THE COURT that if damages cannot be stipulated within thirty days, the Court will refer the question to a commissioner.

Dated at New Orleans, Louisiana on this 20th day of June 1966.

s/ HERBERT W. CHRISTENBERRY,
United States District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Number and Title Omitted.)

(Filed March 7, 1967.)

CHRISTENBERRY, J.

Libelant, Royal Insurance Company, Ltd. brought this action against respondent, Central Gulf Steamship Corporation as charterer and Grace Lines, Inc. as owner of the S/S *Sooner State* (ex *Santa Victoria*) for sweat damage to a cargo of corn in bulk which was shipped from New Orleans, Louisiana to Kandla, India. Grace Lines, Inc. was dismissed by the Court as a respondent prior to trial but remained in the litigation as respondent-impleaded by virtue of 56th Rule Petition filed against it by respondent, Central Gulf Steamship Corporation.

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FINDINGS OF FACT.

1.

Libelant was, at all material times, the insurer of 7,424 long tons of yellow corn in bulk and by virtue of its payment under its policy of insurance to the consignee for the damage to the corn, became subrogated to the rights of the consignee to proceed against the parties responsible for the damage.

2.

Respondent, Central Gulf Steamship Corporation, was at all material times herein, the time charterer of the S/S *SANTA VICTORIA*.

3.

Respondent-impleader, Grace Lines, Inc., was at all material times herein, the owner of the S/S *Santa Victoria*.

On April 14, 1959, respondent, Central Gulf Steamship Corporation entered into a berth grain charter party with Mitchell Cotts & Co., Ltd., pursuant to which respondent was to provide a vessel for the transportation of a bulk cargo of corn from a safe U. S. port to Bombay or Kandla, India and, to issue bills of lading therefor containing U. S. A. Clauses Paramount.

5.

On May 26, 1959, Central Gulf Steamship Corporation entered into a time charter party with Grace Lines, Inc. for the charter of the S/S *Santa Victoria.* Pursuant to the terms of this charter party, charterers were obligated to load, stow, trim and discharge the cargo at charterer's expense under the supervision of the Captain.

6.

On or about June 21, 1959, the S/S *Santa Victoria* was loaded by Central Gulf at New Orleans with the cargo of bulk corn. Three clean bills of lading were issued showing that a total of 7,424 long tons of corn was received aboard the vessel in apparent good order and condition and were signed by the Master of the S/S *Santa Victoria.*

7.

Thereafter, the vessel departed New Orleans and arrived at Kandla, India on August 9, 1959. When the No. 4 hatch was opened the corn therein was found damaged by the chief officer of the vessel.

8.

The No. 4 upper 'tween deck of the vessel had been stowed completely full with corn even up into the hatch trunk. This restricted ventilation of this stowage space

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and allowed sweating of the undersides of the deck plates which caused the damage.[1]

CONCLUSIONS OF LAW.

1.

This matter is governed by the United States Carriage of Goods by Sea Act of 1936. 46 U. S. C. A. §1300-1315.

2.

By proving that the cargo was shipped in good order and condition as evidenced by the clean bills of lading and outturned at a destination in a damaged condition, libelant has established a *prima facie* case of lading.[2]

The facts show that the cargo was improperly stowed and that this improper stowage caused the sweat dam-

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[1]The chief officer noted in the vessel's log for August 9, 1959, the following:

> "Upon opening #4 hatch found that complete top layer of corn in hatch trunk to a depth of 2 ft. was wet and fermented due to lack of ventilation. Further sweat damage was found from sweating of under-deck plating. No ventilation had circulated in #4 UTD due to being loaded completely full."

[2]*The Vallescura*, 298 US 296, 1934 AMC 1573; *Ionian Pioneer*, 236 F2d 78, 1956 AMC 1750 (CA 5); *Shickskinny*, 227 F2d 348, 1955 AMC 2171 (CA 2); *The Saturnia* 226 F2d 147, 1955 AMC 1935 (CA 2); Orient Ins. Co. vs. Flotta Mercante del Estado, 102 FS 729 (ED La.-1951) aff'd 198 F2d 740 (CA 5-1952); The Great Atlantic & Pacific Tea Company vs. Lloyd Brasileiro, 159 F2d 661, 1947 AMC 306 (CA 2); The *Monte Iciar* 167 F2d 334, 1948 AMC 615 (CA 3); Edmond Weil, Inc. vs. American West African Line, 147 F2d 363, 1945 AMC 191 vs. Mississippi Shipping Co., Inc., 1953 AMC 148, 108 FS 918 (ED La.).

age to the corn. Central Gulf attempted to show that inherent vice of the corn caused the sweat damage but the fact that only the corn in the No. 4 upper 'tween deck was damaged while corn in other stowage spaces outturned undamaged, makes this contention untenable. No effort was made by Central Gulf or Grace to show that other stowage with sufficient ventilation could not have been provided which would have prevented such damage.[3]

4.

Central Gulf cannot escape liability to libelant for this damage merely because the corn may have such characteristics that it could become damaged under certain stowage conditions. The fact that stowage was provided, which because of the character or nature of corn, was likely to produce sweat during the voyage, amounts to negligent stowage, especially so, when there is no showing that better stowage space was not available.[4]

5.

Central Gulf is therefore liable to pay all damages sustained by libelant herein, plus interest and costs.

6.

Between Central Gulf and Respondent, Grace Line, although Central Gulf was responsible for the actual load-

[3]Wessels vs. Asturias, 126 F2d 999, 1942 AMC 360 (CA 2).
[4]Ensley City, 71 FS 444, 1947 AMC 568 (DC Md.) aff'd 170 F2d 25 (CA 4-1948); Rita Sister, 1946 AMC 910 (ED Penn.).

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ing and stowage of the corn, the Charter Party provided that this was to be accomplished under the supervision of the Captain. Accordingly, if this stowage prevented proper ventilation, as pointed out in the vessel's log after arrival at the discharge port, then the supervising Master, by failure to object to the unseaworthy loading, assumes the responsibility for the damage caused by the ship's inability to ventilate. Even though the Time Charter provides that the actual loading is to be done by the charterer, the Master, as the vessel owner's representative, must object if the stowage is such as to render the ship unseaworthy or prevent the ship from properly caring for the cargo. By his failure to so act, he has breached the provisions of the Time Charter. This breach of contract renders Grace Line responsible by way of indemnity and, thus, Grace Line must reimburse Central Gulf for its damages, including attorney's fees, together with interest and costs. *Cia de Navegacion Fruco, S. A. vs. M/S HEINZ HORN*, 233 F.S. 637 (SD Ala. 1964) and authorities cited therein.

A decree has been entered accordingly.

New Orleans, Louisiana, March 7, 1967.

s/ HERBERT W. CHRISTENBERRY,
United States District Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 23938

GRACE LINES, INC.,

Appellant,

versus

CENTRAL GULF STEAMSHIP CORPORATION,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(September 19, 1969.)

Before THORNBERRY and DYER, Circuit Judges, and FISHER, District Judge.

FISHER, District Judge: Appellant Grace Lines, Inc. appeals from a judgment granting appellee Central Gulf Steamship Corporation indemnity for the breach of a time charter contract.

Grace Lines, Inc. was the owner of the vessel, SS Santa Victoria, which appellee time chartered, using the government form approved by the New York Produce Exchange, as amended. The Time Charterer entered into an agreement with Mitchell Cotts & Company, Ltd. to transport a cargo of yellow corn in bulk from the Port of New Orleans to the Port of Kandla, India. When the SS Santa Victoria docked in Kandla, India on August 9, 1959, it was discovered that "sweat" damages had been sustained by the cargo because the manner of loading prevented proper operation of the ship's ventilation system.

A complaint was filed by Royal Insurance Company, insurer of the cargo claimant, against Central Gulf Steamship Corporation, Grace Lines, Inc. and the vessel.

The trial judge correctly granted Grace Line's motion for Summary Judgment as to Royal, but committed reversible error in failing to dismiss the third party petition filed by the Time Charterer, Central Gulf, against the vessel owner, Grace.

The Contract between Central and Mitchell to transport the cargo was made subject to the Carriage of Goods by Sea Act of 1936, 46 U.S.C.A. §1300 et. seq. The "USA Clause Paramount" of the time charter party between Grace and Central likewise made that agreement subject to the Carriage of Goods by Sea Act, and the one-year

statute of limitations of Carriage of Goods by Sea Act[1] was applicable.

Grace granted Central written authority to extend the one-year limitation for bringing suit for damages to the cargo through May 9, 1961, but on May 2, 1961 refused to allow a further extension of time. Therefore, Royal's suit filed on August 9, 1961 against Grace was barred by the statute of limitation, being filed too late. *United Fruit Company v. J. A. Folger & Company*, 270 F.2d 666 (5th Cir 1959). Thus, the question is presented of what effect would the statute of limitation provision of the time charter agreement have relative to the indemnity suit? We hold that the indemnity cause of action by Central against Grace was barred by the statute of limitation under the Carriage of Goods by Sea Act.[2]

The trial court held that the cause of action for indemnity was not barred because it had not accrued. *States Steamship Company v. American Smelting and Refining Company*, 339 F.2d 66 (9th Cir. 1964); *Lyons Magnus Incorporated v. American Hawaiian SS Co.*, 41 F.Supp. 575 (S.D. N.Y. 1941); *St. Paul Fire and Marine Insurance Co. v. United States Lines Company*, 258 F.2d 374 (2nd Cir. 1958).

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[1]46 U.S.C.A. §1303 (6)

"... In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: Provided, that if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered ..."

[2]See footnote 1.

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The cases cited support the rule that the ordinary cause of action for indemnity would be separate from the suit for initial liability insofar as time bar periods are concerned. The right of indemnity would accrue once payment was made, and the statute of limitation on an action to enforce that right would not begin to run until payment was made. cf. *State Steamship Co. v. American Smelting and Refining Company*, supra.

The question arises under the applicable provisions of the time charter agreement[3] whether Grace or Central had the final responsibility to see that the vessel was properly loaded. Grace asserts that under the time charter agreement the Master, while carrying out any supervision of stevedoring, is the servant of the charterer and not the servant of the vessel owner; however, the trial court correctly determined that since the capacity of the ship to transport the cargo in the manner specified in the charter party is an aspect of seaworthiness, the captain's failure to object to stowage interfering with ventilation was an omission as agent for the ship owner. *Horn v. Cia de Navegacion Fruco, S.A.*, 404 F.2d 422 (5th Cir. 1968).

Thus the mistake of reasoning made by the able trial court was in assuming at the time suit was filed by Royal

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[3]Time Charter Agreement-Appendix p. 90, Lines 76-79:

"That the Captain shall prosecute his voyage with the utmost dispatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the owners) shall be under the orders and directions of the charters as regards employment and agency, and Charterers are to load, stow, trim and discharge the cargo at their expense under the supervision of the Captain, who is to assign Bills of Lading for cargo as presented in conformity with Mates or Tally Clerks' receipts without prejudice to this Charter party."

that Central would have a cause of action for indemnity against Grace based on breach of the time charter agreement resulting from an unseaworthy condition being created in loading the corn in such a manner as to prevent proper operation of the ship's ventilation system, to which conduct the master of the vessel, as agent for Grace, failed to object.

Central's cause of action is based on the rights of the cargo claimant, and the fact that Central bases its cause of indemnity on a breach of the time charter agreement could not under any theory give Central a greater right than that which the cargo claimant and its insurer, Royal, had against Grace. At the time suit was filed, Royal's cause of action was barred by the limitation period of the Carriage of Goods by Sea Act[4] from proceeding against the vessel owner, Grace, and the trial court correctly so held. Central's indemnity right being predicated on the claim of the cargo owner, and the cargo claimant and its insurer, Royal's cause of action against Grace being barred, clearly Central's cause of action for indemnity against Grace would also be barred. To hold otherwise would be to deny Grace its legal defense of limitation; therefore, the motion of Grace to dismiss the impleading petition should have been granted, for once the period of limitation ran on Royal's suit against Grace, no indemnification theory could establish Central's right to receive indemnification from Grace. Indemnity may not be awarded without the support of liability on the part of the indemnitor to the person injured and since Grace was no longer obligated to Royal, Grace could

[4]See footnote 1.

not be liable in a cause of action for indemnity by Central. *United Air Lines v. Wiener*, 355 F.2d 379, 403 (9th Cir. 1964); *American Tobacco Co. v. Transport Corp.*, 277 F.Supp. 457 (E.D. Va. 1967).

Even if Grace could be held liable for the damaged cargo as the result of an unauthorized extension of the period of limitation by Central, no right of indemnity would exist. By extending the period of Grace's liability to Royal, Central interfered with Grace's defense of limitation and thus would operate to discharge the indemnitor. 42 C.J.S. Indemnity #40 (1944).[5]

The judgment granting Central indemnity against Grace for breach of the time charter contract is reversed and judgment to be entered for Grace.

REVERSED AND REMANDED.

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[5] 42 C.J.S. Indemnity #40 (1944).

"An indemnitor may be released from liability by a subsequent agreement to that effect with the indemnitee,[12] or by the occurrence of an event which, by the terms of the indemnity agreement, is to result in his release,[13] or by circumstances releasing the indemnitee from liability.[14] So also, any act or omission on the part of the indemnitee in breach of his duty under the contract of indemnity that increases the indemnitor's risk or liability or otherwise injures his rights and remedies discharges the indemnitor from his liability under the indemnity contract,[15] at least to the extent of the injury so occasioned.[16]"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 23938

GRACE LINE, INC.,

Appellant,

versus

CENTRAL GULF STEAMSHIP CORPORATION,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC.

(January 20, 1970.)

Before THORNBERRRY and DYER, Circuit Judges, and FISHER, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 23938

D. C. Docket No. 4884 "A" Adm.

GRACE LINE, INC.,
Appellant,

versus

CENTRAL GULF STEAMSHIP CORPORATIION,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY and DYER, Circuit Judges, and FISHER, District Judge.

JUDGMENT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same

is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that appellee pay to appellant the costs of this appeal to be taxed by the Clerk of this Court.

"Per Fisher, D. J."

9/19/69.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1439

CENTRAL GULF STEAMSHIP CORPORATION,

Petitioner,

v.

GRACE LINE, INC.,

Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

Retla Steamship Company and Toko Kaiun Kabushiki Kaisha, as friends of the Court, respectfully urge that this Court review the decision of the U.S. Court of Appeals for the Fifth Circuit in this case because of the extremely adverse effect which the decision, if allowed to stand, will have on the just allocation of responsibility for cargo damage as between shipowners and charterers under the form of time charter most commonly used in the carriage of cargo to and from United States ports.

THE INTEREST OF THE AMICI CURIAE

Retla Steamship Company is a California corporation and Toko Kaiun Kabushiki Kaisha is a Japanese corporation. They are unrelated to one another and to the parties to this action. Both are heavily engaged in the carriage of cargo between foreign ports and ports of the United States aboard vessels time chartered under the form of charter involved in this case. Toko is owner of some ships and time charterer of others. Retla is a time charterer. They are filing this amicus curiae brief in their own interest as well as in the interest of other shipowners and charterers who will be affected by the Fifth Circuit decision.

ARGUMENT

Much of the cargo carried to and from the United States by sea is now carried on time chartered vessels. The charter form most commonly used for this purpose is the New York Produce Exchange form time charter, which is the charter form involved in the present case. The "U.S.A. Clause Paramount" provision particularly referred to in the present case is a printed clause of the standard charter form and is contained without modification in most such charters. The impact of the Fifth Circuit decision is therefore general in this branch of the maritime industry.

This form of time charter is a contract by which the owner of the vessel lets the carrying capacity of the vessel to the time charterer for a period of time for the carriage of such cargo between such ports as the time charterer determines. The performance of the functions which must be performed in order to carry and deliver the cargo safely is divided between the shipowner and the time charterer, with the shipowner responsible for the seaworthiness, navigation and management of the vessel and the custody of the cargo during the voyage, and the time charterer responsible for

most aspects [1] of the loading, stowage, discharge and delivery of the cargo. The time charterer ordinarily contracts with third party cargo owners to carry cargo on the vessel under bills of lading issued by either the charterer or the shipowner. Whichever party issues the bills of lading assumes thereby toward the cargo owner all of the obligations of a carrier under the U.S. Carriage of Goods by Sea Act. *46 U.S.C.* § 1301 (a) and (b); 1303 (1) and (2). Therefore, the party issuing the bills assumes obligations to the cargo owner for the proper performance of some work which, under the charter, is performed by the other party. In this situation, the rights of indemnity between shipowner and charterer are the only means by which ultimate responsibility for failure in the performance of a particular function can be brought home to the party which performs that function and which is in the best position to guard against faulty performance. The Fifth Circuit decision in this case places capricious and unwarranted obstacles in the way of the pursuit of these rights of indemnity.

The Fifth Circuit states,[2] as the ground for its decision, that the indemnity rights of the time charterer against the vessel owner are "based on" the rights of the cargo owner against the vessel owner, and that "once the period of limitation ran on [the cargo insurers] suit against [the vessel owner] no indemnification theory could establish [the time charterers] right to receive indemnification from [the vessel owner]." Such a rule places the rights of indemnity between

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[1]The shipowner remains responsible for those aspects of loading, stowage or discharge which affect the seaworthiness of the vessel or the ability of the vessel to perform its obligations as to the care of the cargo. *Horn v. Cia. de Navegacion Fruco, S.A.*, 404 F.2d 422 (5th Cir. 1968), cert. denied 394 U.S. 943. It was the shipowners responsibility for stowage in a manner interfering with the obligation of the ship to properly ventilate the cargo which was the basis of the time charterer's right of indemnity against the shipowner in the case at bar.

[2]In the part of its opinion reprinted at page 20 of the Petition for Certiorari.

charterer and shipowner entirely at the mercy of the whim of the cargo damage claimant. The cargo damage claimant has the right to sue either the shipowner or the time charterer or both at its election. More often than not, the cargo damage claimant sues only the party which issued the bill of lading. If it considers the party which issued the bill of lading to be financially responsible, it ordinarily has no interest in also suing the other party and will ordinarily let the time for suit run against the other party. Therefore, the result of the rule announced by the Fifth Circuit in this case will usually be to prevent responsibility for the cargo damage from being brought home to the party which ought to bear it.

This rule stated by the Fifth Circuit is clearly erroneous. It is based upon confusion between the rules of law applicable to causes of action for indemnity between concurrent tort feasors based on tort principles, such as were involved in *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir. 1964), cert. dismissed 379 U.S. 951, and the rules applicable to claims for indemnity based upon contract. The Fifth Circuit decision is clearly contrary to the rules governing contractual claims for indemnity as announced by this Court in such cases as *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

There is also an implication in the Fifth Circuit decision that under this form of charter, a suit by the time charterer against the vessel owner, or vice versa, for indemnity with respect to a cargo damage claim must be brought within one year after the cargo damage occurs. As a practical matter, any such rule will either destroy most rights of indemnity or require shipowner and time charterer to file anticipatory law suits against one another in order to preserve those rights. Typically, suits for cargo damage are filed not by the owner or consignee of the cargo, but by insurers of the cargo who have become subrogated to the rights of the consignee or the owners, as in the case at bar. These insurers do not present claims to the ocean carrier until they have adjusted and paid the loss, and this usually does not occur

until just before the one year time for suit is about to run. The suit is often filed against either the owner or the time charterer with only days or hours of the time period left. There is then no time for the party originally sued to assert a claim for indemnity against the other before the one year period from the time of the cargo damage runs. Therefore, the only way in which owner and time charterer can protect their rights of indemnity is to file lawsuits against one another before they have been sued by the cargo claimants in every situation where they fear a claim may result. This would further burden already overcrowded court dockets. Moreover, even such anticipatory suits will not be successful in protecting rights of indemnity if those rights depend upon whether the cargo damage claimant has sued the other party within the one year time for suit, as the Fifth Circuit has said that they must do.

This implication in the Fifth Circuit decision is also contrary to the established principle that the time for suit on a contractual claim for indemnity does not begin to run until the party seeking indemnity has paid a claim or has suffered judgment. *States Steamship Company v. American Smelting & Refining Company*, 339 F.2d 66 (9th Cir. 1964), cert. denied 380 U.S. 964. *Hidick v. Orion Shipping & Trading Co.*, 157 F.Supp. 477, 484-489 (S.D.N.Y. 1957), aff'd. 278 F.2d 114 (2nd Cir. 1960), cert. denied 364 U.S. 830.

CONCLUSION

This Court should grant certiorari in this case for the purpose of clearing away the unreasonable and unwarranted obstacles which the Fifth Circuit decision places in the way of the enforcement of claims for indemnity between ship-

owners and charterers under the form of time charter most commonly used in United States commerce.

Respectfully submitted,

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FILED
MAY 16 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

NO. 1439

CENTRAL GULF STEAMSHIP CORPORATION,

Petitioner,

versus

GRACE LINE, INC.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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Grace Line, Inc., as owner of the S.S. SANTA VICTORIA, granted Central Gulf Steamship Corporation, as time charterer, written authority to extend the one-year limitation for bringing suit for cargo damages through a certain date and in advance of that date refused in writing to grant further extension. Central Gulf Steamship Corporation, despite this knowledge, granted cargo a further extension of time. Cargo's subsequent suit against Grace Line, Inc., was barred by the statute of limitation, being filed too late. *United Fruit Company v. J. A. Folger & Company*, 270 F.2d 666 (5th Cir. 1959).

The District Court dismissed cargo's suit against vessel owner, but not time charterer's third-party complaint.

The trial court held that the cause of action for indemnity, based upon the charter agreement, was not barred. The time charter between vessel owner and charterer was a Government Form Charter, approved by the New York Produce Exchange. All of the defenses of the Carriage of Goods by Sea Act[1] were incorporated into this agreement by utilization of the "USA Clause Paramont". The decision of the District Court circumvented the Fifth Circuit's decision in *United Fruit Company v. J. A. Folger & Company, supra.* Time charterers under the decision of the District Court could deal with cargo as they chose, and at some later date, years after the expiration of the one-year statutory period of COGSA, bring suit against the vessel owner.

The Fifth Circuit correctly held that the indemnity cause of action by the time charterer against the vessel owner was barred by the statute of limitation under the Carriage of Goods by Sea Act. To hold otherwise would have denied the vessel owner its legal defense of limitation under the Carriage of Goods by Sea Act, *supra,* which was incorporated in the Bill of Lading issued by time charterer and in the time charter itself.

The Fifth Circuit in support of its decision correctly states,

> ". . . Indemnity may not be awarded without the support of liability on the part of the indemnitor to the person injured and since Grace was no longer obligated to Royal, Grace could not be liable in a cause of action for indemnity by Central. *United Air Lines v. Wiener,* 355 F.2d 379, 403 (9th Cir. 1964); *American Tob-*

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[1] 46 U.S.C.A. § 1300 et seq.

acco Co. v. Transport Corp., 277 F.Supp. 457 (E.D. Va. 1967).

"Even if Grace could be held liable for the damaged cargo as the result of an unauthorized extension of the period of limitation by Central, no right of indemnity would exist. By extending the period of Grace's liability to Royal, Central interferred with Grace's defense of limitation and thus would operate to discharge the indemnitor. 42 C.J.S. Indemnity #40 (1944)."

The petition should be denied because there is no conflict between Circuits on the issue correctly decided by the Fifth Circuit.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Opposition to Petition for Certiorari was posted, first class, postage prepaid, to Robert B. Acomb, Attorney for Petitioner, 28th Floor, Louisiana and Southern Life Building, New Orleans, Louisiana 70112, this day of May, 1970.

JOHN W. SIMS

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